88-56

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

NICK KANE,
Petitioner,

vs.

ARMIN EMRANI and ZAHRA AMIRDIVANI,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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QUESTIONS PRESENTED FOR REVIEW

I. Is it impermissible under the Due Process Clause, and the Equal Protection Clause, for Iranian citizens to bring an action in an American court against an American citizen and defeat efforts take their depositions by claiming lack of knowledge of the case, inconvenience, inability to speak English, and by asserting through their lawyer's unverified and unsubstantiated statement that the husband of one of the plaintiffs would be executed by the Iranian government if it became known that he possessed assets as claimed by the plaintiffs?

II. Were the evidentiary privileges bestowed by the court in favor of the foreign plaintiffs which resulted in the granting of summary judgment in favor of the plaintiffs and against an American defendant, and dismissal of his counterclaim, a denial of due process of law and equal protection of the laws, particularly when the defendant is precluded from proving his defenses and counterclaim by a protective order denying him the right to take the plaintiffs' depositions?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Colorado Court of Appeals and the denial by the Supreme Court of Colorado of petitioner's petition for a writ of certiorari to the Colorado Court of Appeals on April 11, 1988.

OPINIONS BELOW

The opinion of the District Court in and for the County of Larimer, State of Colorado, dated March 24, 1986, is reprinted in the appendix hereto, *infra*, p. A1.

The opinion of the Colorado Court of Appeals dated October 8, 1987, is reprinted in the appendix hereto, *infra*, p. A4.

JURISDICTION

The order of the Colorado Supreme Court denying petitioner's Petition for Writ of Certiorari to the Colorado Court of Appeals was entered on April 11, 1988 (Appendix C), and the mandate of the Colorado Court of Appeals was entered on April 18, 1988 (Appendix D). This petition for certiorari is filed within 90 days of the Colorado Supreme Court's order and the final mandate of the Colorado Court of Appeals. Jurisdiction of the Court is invoked pursuant to Title 28, United States Code, § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution of the United States:

> § 1. *Citizenship defined—privileges of citizens.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Article II, § 25, Constitution of Colorado:

> *Due process of law.*—No person shall be deprived of life, liberty or property, without due process of law.

Colorado Revised Statutes, § 38-10-117:

Conveyance to defraud creditors void. Every conveyance or assignment in writing or otherwise of any estate or interest in lands, goods, or things in action or of any rents and profits issuing thereupon, and every charge upon lands, goods, or things in action or upon the rents and profits thereof made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suits commenced, or decree or judgment suffered with the like intent as against the person so hindered, delayed, or defrauded shall be void.

STATEMENT OF THE CASE

This is an action to recover on a promissory note executed by petitioner (Kane) on April 29, 1983, made payable to one Ali Emrani in the sum of $262,000.00 plus interest, and due and payable in five years. The note was given as part of the purchase price of a restaurant near Fort Collins, Colorado, being sold to petitioner by Emrani. On July 26, 1984, without Kane's knowledge, Ali Emrani assigned the note to the respondent, Armin Emrani, his niece, and Zahra Amirdivani, his sister, both of whom are Iranian citizens. The actual residence of the respondents was never revealed to Kane or his counsel, although serious efforts were made to obtain such information. From statements made by Ali Emrani, it appears that his sister lives part of the time near Paris, and also in Tehran. Nothing is known about the niece.

Ali Emrani filed the action under a power of attorney which appears to have been signed in Fort Collins, Colorado, but he stated under oath that he did not know where either respondent was.

Kane admitted the execution of the note, and that he was in default,[1] but in his answer he invoked the Colorado Statute of Fraudulent Conveyances. Colorado Revised Statutes § 38-10-117. He also filed a counterclaim seeking a decree adjudging the assignment to be null and void. Kane charged that the assignment was made without consideration; that the respondents and Ali Emrani had combined to hinder, delay, and deprive Kane and others of their lawsuits and just claims; and that the respondents were not the real parties in interest. He further alleged that he had a lawful claim against Ali Emrani, the assignor, which existed prior to the assignment and which was filed in adversary proceedings in the United States Bankruptcy Court for the District of Colorado after the assignment. It was subsequently refiled in the Larimer District Court, State of Colorado, with Kane as one of the plaintiffs.[2]

Kane promptly sought to initiate discovery by scheduling the depositions of the respondents. The depositions were noticed in for November 22, 1985. An unverified motion for a protective order was filed by respondents claiming they were plaintiffs only by reason of the assignment, and that the assignment was executed to repay a past debt Ali Emrani owed to his brother, Mehdi Emrani, also an Iranian citizen living in Iran.

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1. The restaurant and its contents were almost totally destroyed by a fire on December 7, 1983.

2. Litigation between Kane and Ali Emrani, and others, is still pending in the Larimer District Court.

Mehdi Emrani was the husband of Zahra Amirdivani, and the father of Armin Emrani.

It was further claimed in this unsworn document, signed only by respondents' attorney, that Mehdi Emrani was the president of the legal department of the Central Bank of Iran, a high government office, could not hold assets in his own name, and if he did, he would be executed. The motion claimed this was the reason for the assignment.[3] It was further alleged that his wife lived out of the country (Iran), that she spoke no English, and that to force her to appear for the taking of her deposition would be an undue burden on her. It was said that other persons had real knowledge of the facts. With regard to the other respondent, Armin Emrani, it was said she spoke some English, and knew little about the transaction.[4]

Inexplicably, it appears that Ali Emrani and his attorneys still maintain that they do not know the addresses of the two respondents.

On November 19, 1985, the trial court granted the motion and ordered respondents' counsel to prepare and file a "Summary of Plaintiffs' Testimony Regarding Ownership of Note." In response, another unsworn document was filed, signed by an attorney, which attempted to explain a debt owed by Ali Emrani to Mehdi Emrani which allegedly arose out of funds being sent from Mehdi

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3. It was never explained why such a revealing document was filed as a public record in an American court.

4. It was also stated that Ali Emrani could furnish all the details. When his deposition was subsequently taken, it was found that his knowledge was limited, and based almost totally on inadmissible hearsay. His statements regarding Iranian law and custom were obviously those of a non-expert.

to Ali. There was no explanation of how Mehdi could send large sums of money through banking channels when it was claimed ownership of assets meant execution. A document claimed to have been signed by Mehdi and Ali was produced. It only raised more questions concerning the reasons for the assignment.

A status conference was held on January 14, 1986. During the course of the conference Kane's counsel advised the trial court that he must take the depositions of the respondents. It was particularly imperative that he do so since the respondents had filed a motion for summary judgment. Counsel asked the court if it would require a formal request. The response was that it was not necessary, and it would reconsider the matter.[5]

On March 14, 1986, without ruling on Kane's request regarding the respondents' depositions, the court granted respondents' motion for summary judgment and dismissed the counterclaim (Appendix A). The court premised its ruling on the theory that Kane's claim against Ali Emrani was not "ripe", and it had not been reduced to judgment or otherwise "perfected" at the time the respondents brought their action. Judgment was entered against Kane in the sum of $290,925.25 plus interest at the rate of $133.96 per day from January 10, 1986. The court did not address Kane's request that he be permitted to take the respondents' depositions.

The Colorado Court of Appeals affirmed (Appendix B). Its opinion is somewhat confusing on the issues of state law regarding fraudulent conveyances, and creditor-

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5. The trial judge did not have a reporter present. An affidavit was filed setting out the details of the request and the trial judge's reply. It has not been opposed or questioned.

debtor relationships, but that can be no issue here. What does assume relevance before this Court is the view of the Court of Appeals concerning the record. It pointed out that failure of consideration alone is not a valid ground for invoking the state Statute of Fraudulent Conveyances. There must be evidence of fraudulent intent and this was not shown in the record. Regarding Kane's contention that he was deprived of the opportunity of full discovery, it was said: "The record does not support this argument." It held that "it is at least questionable whether the matters on which the defendant sought to depose the plaintiffs were relevant to anything other than issues concerning consideration."

On April 11, 1988, the Colorado Supreme Court denied certiorari (Appendix C). The Colorado Court of Appeals issued its mandate on April 18, 1988 (Appendix D).

REASONS FOR ALLOWANCE OF THE WRIT

I. Petitioner was denied due process of law, and equal protection of the laws, when after being sued in the Colorado state court by Iranian citizens, he was precluded from taking their depositions by a protective order so that he was unable to establish intent, knowledge, or many other facts, relating to fraud as a defense, and as the basis of his counterclaim.

II. The petitioner was denied due process of law, and equal protection of the laws, when summary judgment was entered against him, and his counterclaim dismissed, after he had been barred from taking the depositions of the two Iranian citizens who had brought the action against him.

Discovery issues may reach a constitutional level. *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). As the Court pointed out in *Rogers*, there are constitutional limits upon the power of courts to dismiss an action without affording a party the opportunity for a hearing on the merits of his case. A court, whether it be a state or federal court, cannot resolve issues favoring one class of litigant over another. *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). Evidentiary privileges in litigation are not favored. *Herbert v. Lando*, 441 U.S. 153, 175, 99 S.Ct. 1635, 60 L.Ed.2d 115, 133 (1979).

In supervising pretrial proceedings, American courts should exercise special vigilance to protect foreign lit-

igants from the danger that unnecessary or unduly burdensome discovery may place them in a disadvantageous position. *Societe Nationale v. United States District Court, S.D. Iowa,* ..... U.S. ....., 107 S.Ct. 2542 (1987). But, this admonition works both ways. It appears clear that for reasons unfathomable to Kane and his counsel, the trial judge bestowed evidentiary privileges and procedural advantages on respondents impermissible under traditional concepts of due process and equal protection of the laws. The procedural deficiencies and the resulting judgment raise serious federal questions regarding the treatment of American citizens when confronted with clever foreign adversaries who under the guise of not seeing, not knowing, and not telling, manipulate our judicial system so that its fundamental fairness is turned against those who are instrumental in supporting it. Our system should be able to deal with the machinations of a person like Ali Emrani who assigns a note to two foreign relatives, takes back an alleged power of attorney, files suit in an American court against an American citizen, and then advises the court, the defendant and his counsel, and even his own counsel, that he doesn't know where the two plaintiffs are. He does this in tandem with allegations that they speak little or no English, know little or nothing about the case, that it would be inconvenient to give their depositions, and that if an American court requires the taking of those depositions, their husband and father would be executed by his government.[6] This is ludicrous and demonstrates an intolerable contempt for our cherished ideals of fundamental fairness which, unfortunately, was further fueled

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6. Actually, we have used an euphemism. The word used in the motion for a protective order was "killed."

by a high degree of success in the trial court. He has a judgment now totaling over $400,000.00, and increasing at the rate of $48,000.00 annually. The trial court did not even request verification of the bizarre allegations presented to it by respondents' attorneys. Disregarding all settled rules of procedure, particularly those relating to discovery, all it requested, after entering the protective order, was an unsworn statement by the attorneys which the court designated as a "Summary of Plaintiffs' Testimony Regarding Ownership of Note."[7]

The Colorado Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure with few changes regarding discovery. *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959). Here, Rules 30 and 37 of the federal and state rules governing the taking of oral depositions and sanctions are applicable, whether in state or federal court. When a litigant seeks summary judgment, there are clearly defined procedures to follow including affidavit practice. Rule 56(e), Federal Rules of Civil Procedure and Rule 56(c), Colorado Rules of Civil Procedure, provide in pertinent part:

> *Form of affidavits; further testimony; defense requires.* Supporting and opposing affidavits shall be made on personal knowledge, *shall set forth such facts as would be admissible in evidence*, * * * (Emphasis supplied.)

The trial court imposed no such conditions on respondents.

It is obvious that the respondents' Iranian citizenship and residency (not yet known) were used as a weapon

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7. The protective order was entered without Kane being given an opportunity to argue the motion.

against Kane. The courts have been fair to foreign litigants, but have also been firm and have not permitted any unfair advantage over citizen-litigants. See *Rogers, supra.* In *Transcontinental Motors, Inc. v. NSU Motorenwerke Aktie & Gesellshaft,* 45 F.R.D. 37 (D.C. N.Y. 1968), it was held that mere allegations that deponent knows nothing about the matters involved does not prohibit the taking of the deposition. Inconvenience to a party whose deposition is to be taken does not justify prohibiting the taking of the deposition. *Goldbert v. Raleigh Mfrs., Inc.,* 28 F.Supp. 975 (D.C. Mass. 1939). There can be no valid reason for making an exception in the instant case.

Kane need not stress the importance of taking the depositions of the respondents particularly since intent to defraud is an issue. Interrogatories will not do. The documents available are very few and are all hearsay. Requests for admissions would be meaningless. A deposition, with the right to cross-examine adverse witnesses, is a priceless weapon in the trial lawyer's arsenal. For example, the examiner is not limited to issues raised by the pleadings. Discovery, itself, is designed to help define and clarify the issues, and is not limited to the merits of the case. A variety of fact-oriented issues may arise during the course of litigation that are not related to the merits. *Oppenheimer Fund v. Sanders,* 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253, 265 (1978).

Also, the actions of Ali Emrani could easily be interpreted as a part of a structured relationship designed to frustrate the orderly process of discovery proceedings. *United States v. Johnson,* 802 F.2d 1459 (D.C. Cir. 1986).

Denying Kane this valuable discovery tool is a repudiation of his constitutional right to defend the case on

the merits. There is no way one can justify the protective order on the basis of the material submitted to the trial court. Even if the respondents' knowledge of the facts of this case is wanting, Kane should be given the opportunity to prevail if respondents cannot carry the ultimate burden. In *Rogers,* a Swiss holding company brought an action against the United States Attorney General and the Treasurer of the United States to recover property allegedly wrongfully seized during World War II as property owned by an enemy national. The plaintiff, by reason of certain Swiss laws, was unable to fully comply with requests for documents and other information. The complaint was dismissed with prejudice by the district court, and affirmed by the Court of Appeals for the District of Columbia Circuit. 253 F.2d 254. On certiorari the Court reversed. It was held that where failure of the Swiss plaintiff to fully comply with the requirements of a pretrial production order was not due to inability fostered by its own conduct or by circumstances within its control, but because production of documents might violate Swiss laws, dismissal of the complaint was not justified. No such showing was made here. But, the Court pointed out in *Rogers* that the case should be tried since the plaintiff's inability to produce information or knowledge could be a serious handicap in proving its case. In fact, lack of disclosure could produce unfavorable inferences and a challenge to good faith which would not go unnoticed by the trier of fact. Here, it would be the jury.

Kane took the deposition of Ali Emrani and an attorney. The testimony of Emrani was not only vague and evasive, but consisted mostly of inadmissible hearsay, and a futile attempt to define the laws and customs of Iran.

If a litigant is to rely upon the law and customs of a foreign country, he carries the burden of proving such law and customs. *Slater v. Mexican Nat. R.R. Co.*, 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed. 900 (1904).

Rogers also disposes of any "blocking statute" that may be applicable if this case is tried on the merits.[8] In footnote 29 of the opinion, the Court said:

> It is well settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.

See also *Societe Nationale, supra.* If an American court has the power, once jurisdiction attaches, to compel a foreign national to produce evidence in violation of the laws of his country, it clearly can compel a foreign litigant, who chooses to bring suit against an American citizen in an American court, to be bound by American discovery practices, particularly when there is no evidence of a "blocking statute."

Being in a foreign country is no impediment to the taking of a litigant's deposition. Rule 28(b) of both the Colorado Rules of Civil Procedure and the Federal Rules of Civil Procedure provide detailed procedures with regard to taking such depositions. Also, there appears to be no valid reason why the court could not order the foreign litigants to appear in the jurisdiction wherein their action has been filed in order to give their depositions. Furthermore, there is no evidence in the record that Mehdi Emrani, whose deposition should also be taken,

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8. *Societe Nationale, supra,* defines and discusses foreign "blocking statutes" in the discovery context.

would not be available for the trial or the taking of the deposition. The trial court had jurisdiction and had the power to order the taking of the depositions, or going to trial without the depositions. See *Rogers, supra.* Instead, it unconstitutionally elected to grant summary judgment and dismiss Kane's counterclaim. Foreign residents should not be given an advantage not available to litigants residing in the United States who are routinely required to give their depositions in the jurisdiction wherein they file their lawsuits.

CONCLUSION

The circumstances of this case are unusual and demonstrate a complete lack of due process, equal protection of the laws, evidentiary privileges, and disparate treatment of litigants, all of which gave Kane an unwarranted disadvantage in litigating the merits of his case. The respondents manipulated the judicial system in such a manner so as to warrant the intervention of the Court. Never has the Court defined due process guidelines regarding treatment of foreign litigants when they use the discovery rules to avoid giving key depositions in an American court.

It is anticipated that the respondents will argue that other methods of discovery were available. The answer appears obvious: Absent extremely unusual circumstances, a litigant cannot dictate what discovery may be available to an opposing party. It should be clearly ruled that the fact of residency in another country will not exempt or spare the foreign litigant from the invocation of American discovery processes in the same manner as applied to American citizen-litigants.

The record in this case consists mostly of hearsay without a shred of admissible evidence regarding Mehdi Emrani's intentions or what he did, or what the respondents knew, intended, or did. The trial court and the Colorado Court of Appeals showed no concern about the Due Process Clause, or the Equal Protection Clause, or the fairness of the proceedings. This lack of perception of what they have done to Kane deserves the attention of the Court. The course of the proceedings in the lower courts, who fashioned their own blocking statute, can never be understood or explained to a person like Kane, a Greek emigrant who has attained citizenship. The inexplicable actions of the trial court, and the extremes to which it went to protect and favor foreign plaintiffs, should not be permitted to happen again.

For the reasons above expressed, a writ of certiorari should issue to review the judgment of the state courts involved, and the applicability of American discovery processes to foreign litigants.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Filed March 24, 1986)

DISTRICT COURT, COUNTY OF LARIMER,
STATE OF COLORADO

Case No. 85CV737

ORDER PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

ARMIN EMRANI and ZAHRA AMIRDIVANI,
Plaintiffs,

vs.

NICK KANE,
Defendant.

The Plaintiff filed a Motion for Summary Judgment alleging that there is no issue of fact and it is uncontroverted that:

(a) Defendant executed the promissory note attached to the Plaintiff's Complaint based upon which this action is being brought.

(b) Defendant has not made payments due and said promissory note is presently in default.

(c) There are executed documents assigning said note to the Plaintiffs herein.

The Defendant has not controverted these facts but raises as a affirmative defense C.R.S. 38-10-117. It is Defendant's position that the assignment of the note was "made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, debts, or demands. . ."

The one issue that needs to be addressed is Defendant's standing to raise this defense or whether or not this claim is "ripe" for adjudication (Defendant has also raised this claim in his counterclaim). At this time, the Defendant does not have judgment against one Ali Emrani the payor who assigned the note to the Plaintiff. The Defendant has filed a lawsuit against Ali Emrani which is an unliquidated claim. Thus, this Court would find and rule that the Defendant does not have standing to raise this defense as his claim is not "ripe" at this time. A review of cases brought pursuant to the statute in question reveal that persons seeking to set aside a conveyance had obtained a judgment or perfected their claim at the time they brought the action to set aside the conveyance. The Defendant has the right if he should be successful on his lawsuit to then attack the conveyance (see *Thuringer vs. Trafton*, 58 Colorado 250 at page 253).

This ruling does not leave the Defendant without protection or alternatives. Defendant may in the other lawsuit seek an injunction or upon execution request a stay, etc. Defendant may well have to post security as may be required by the statutes or rules to obtain a stay. But to allow Defendant to proceed upon an allegation of a "mere expectancy" would be to circumvent the rules regarding obtaining injunctions and or stays of executions.

Therefore, the Court finds that there is no disputed facts and as a matter of law finds that the Defendant signed the promissory note in question, that the payments as required by said note has not been paid; and Plaintiffs are entitled to a judgment in their favor for the amount of the note, interest, attorney's fees and costs as allowed by law in the amount of $290,925.45. Wherefore judgment is entered in favor of the Plaintiffs Armin Emrani and Zahra Amirdivani and against the Defendant Nick Kane in the amount of $290,925.45 with interest from January 10, 1986 until judgment is paid at the rate of $133.96 per day.

Pre-trial conference and trial settings are hereby vacated with Defendants counterclaim dismissed without prejudice.

By the Court this 24th day of March, 1986.

/s/ William F. Dressel
William F. Dressel
District Court Judge

APPENDIX B

(Filed October 8, 1987)

Not Selected for Publication

COLORADO COURT OF APPEALS

No. 86CA0607

ARMIN EMRANI and ZAHRA AMIRDIVANI,
Plaintiffs-Appellees,

v.

NICK KANE,
Defendant-Appellant.

Appeal from the District Court of Larimer County
Honorable William F. Dressel, Judge

DIVISION II

Opinion by
JUDGE KELLY JUDGMENT AFFIRMED

Smith and Sternberg, JJ., concur

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Joseph P. Genchi, P.C.
Joseph P. Genchi
Estes Park, Colorado
Attorney for Defendant-Appellant

Plaintiffs, Armin Emrani and Zahra Amirdivani, brought this action against the defendant, Nick Kane, to recover on the latter's promissory note to the plaintiffs' assignor, Ali Emrani. Defendant appeals the summary judgment entered by the trial court in favor of the assignees. The defendant's affirmative defense and counterclaim were based on the assertion that the assignment was a conveyance made to hinder, delay, or defraud creditors contrary to §38-10-117, C.R.S. (1982 Repl. Vol. 16A). The trial court ruled that, for it to set aside the allegedly fraudulent conveyance, the defendant would have to establish that he was in fact a creditor of the assignor. The propriety of this ruling is the principal issue on appeal. We affirm.

The plaintiffs are the niece and sister-in-law of the assignor, and the record indicates that the assignment was for the purpose of settling family accounts between Ali and his brother, Mehdi Emrani, who is the husband and father of the plaintiffs. It is uncontroverted that the defendant executed the promissory note, that payments were not made as promised, and that the note was in default.

As grounds for reversal, the defendant argues that it is not necessary for him to be a judgment creditor at the time of the allegedly fraudulent conveyance in order to render the transfer void. He relies on *Thuringer v. Trafton*, 58 Colo. 250, 144 P. 866 (1914), the very case cited by the trial court. He also cites other early Colorado cases to the same effect.

The plaintiffs respond that, while it is true that a debtor-creditor relationship need not exist at the time the transfer was effected, nevertheless, it is necessary to establish that such a relationship exists at the time

it is sought to set aside the transfer. While this proposition is not explicitly stated in the cases cited and relied upon by the plaintiffs, it is inferable therefrom. Moreover, §38-10-120, C.R.S. (1982 Repl. Vol. 16A) provides that "the question of fraudulent intent, in all cases arising under the provisions of this article, shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent against creditors or purchasers solely on the ground that it was not founded on a valuable consideration."

Here, the defendant made no showing in pleadings, affidavits, or otherwise, of the existence of a debtor-creditor relationship between Ali Emrani and himself, other than pleading the existence of an action in Larimer County in which he was the plaintiff and Ali Emrani was the defendant. Further, other than the fact that the assignment was made between members of the family, there is not the slightest suggestion of any fraudulent intent. Hence, the record is not sufficient to withstand the motion for summary judgment.

The defendant's second contention is that he was improperly deprived of the opportunity to make full discovery and establish his case. The record does not support this argument, as the plaintiffs point out in their answer brief. Further, it is unclear that Ali Emrani, whose fraudulent intent is in issue, was unavailable for discovery purposes, and it is at least questionable whether the matters on which the defendant sought to depose the plaintiffs were relevant to anything other than issues concerning consideration. *See* §38-10-120, C.R.S.

Judgment affirmed.

JUDGE SMITH and JUDGE STERNBERG concur.

APPENDIX C

(Filed April 11, 1988)

SUPREME COURT, STATE OF COLORADO

Case No. 87SC470

Certiorari to the Colorado Court of Appeals 86CA0607
Larimer County District Court 85CV737

NICK KANE,
Petitioner,

v.

ARMIN EMRANI and ZAHRA AMIRDIVANI,
Respondents.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 11, 1988.

APPENDIX D

(Filed April 18, 1988)

Appeal from the District Court, County of Larimer, State of Colorado, to the Colorado Court of Appeals. Opinion issued & judgment entered October 8, 1987 before Kelly, Smith & Sternberg, JJ.

COURT OF APPEALS, STATE OF COLORADO
2 East Fourteenth Avenue, Suite 300
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Court of Appeals No. 86CA0607
Tr Ct. No. 85CV737

ARMIN EMRANI and ZAHRA AMIRDIVANI,
Plaintiffs-Appellees,

v.

NICK KANE,
Defendant-Appellant.

MANDATE

This cause came to be heard on the record on appeal from the District Court, County of Larimer, and was argued by counsel, on consideration thereof, it is ordered that the Judgment of said Court is AFFIRMED.

Gary Sonke
Clerk of Court
/s/ C. K. Gerlofs
by: Carolyn K. Gerlofs,
Supervisor

DATE: April 18, 1988